FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY

HARRY GIBBS COMMONWEALTH LAW COURTS
119 NORTH QUAY
BRISBANE QLD 4000

31 July 2023

Carl English
Intake and Early Resolution Team
Freedom of Information Regulatory Group
Office of the Australian Information Commissioner
GPO Box 5288
Sydney NSW 2001

By email: foidr@oaic.gov.au

Dear Sir/Madam

Freedom of Information Act Review MR22/01583 – Ray B1 (8)
Submission

I refer to your email of 10 July 2023 to the Federal Court of Australia (the **Court**) in which you notified the Court, pursuant to s 54Z of the *Freedom of Information Act 1982* (Cth) (the **FOI Act**), that an application has been made for the Information Commissioner to review an internal review decision of the Court dated 4 October 2022. The application to the Information Commissioner has been made on the basis that the applicant contests that further documents exist within the scope of their request.

The decision dated 4 October 2022 (**Attachment 4**), which is the decision the subject of review by the Information Commissioner, was an internal review decision on an internal review request received on 3 September 2022 (**Attachment 3**). The internal review decision refused the applicant's request for access to documents under s 24A(1) of the FOI Act on the basis that all reasonable steps were taken to find the documents requested but the documents could not be found or do not exist.

The FOI applicant's original request for access to documents was made on 3 August 2022 (**Attachment 1**). A decision was made on the applicant's original FOI request on 2 September 2022 (**Attachment 2**). Like the internal review decision, the original decision refused the applicant's request for documents under s 24A(1) of the FOI Act on the basis that all reasonable steps were taken to find the documents requested but the documents could not be found or do not exist.

In your email to the Court, you requested that the Court provide a range of documents relevant to the decision under Information Commissioner review, as well as submissions in response to the applicant's contestation of the Court's reasons for refusing access to the

documents requested. The documents requested by the OAIC have already been provided under separate letter.

Reasonable steps to identify the documents relevant to the FOI request – s 24A(1)

1. The Court submits that the requirements of subsection 24A(1) have been met in that the Court took "*all reasonable steps*"[1] to find documents within the scope of the FOI request and that the agency was satisfied that the documents could not be found or did not exist.

2. The *Guidelines issued by the Australian Information Commissioner under s 93A of the Freedom of Information Act 1982* (the **FOI Guidelines**) provide that agencies should undertake a reasonable search on a flexible and common-sense interpretation of the terms of the request, and what constitutes a reasonable search will depend on the circumstances of each request and will be influenced by the normal business practices in the agency's operating environment. At a minimum, the FOI Guidelines provide that an agency or minister should take comprehensive steps to locate documents, having regard to:

    - *the subject matter of the documents*
    - *the current and past file management system and practice of destruction or removal of documents*
    - *the record management system in place*
    - *the individuals within the agency who may be able to assist with the location of documents, and*
    - *the age of the documents.*[2]

3. The FOI Guidelines also provide that agencies are responsible for managing and storing records in a way that facilitates finding them for the purposes of an FOI request. The steps taken to search for documents should include the use of existing technology and infrastructure to conduct an electronic search of documents, as well as making enquiries of those who may be able to help locate the documents.[3]

4. Relevant to determining whether all reasonable steps have been undertaken are the considerations espoused in *Palmer Leisure Coolum Pty Ltd and The Treasury (Freedom of information)* [2022] AATA 2475. In that case, Deputy President Dr McDermott RFD cited with approval *Re Bienstein and Attorney-General (Cth)* [2008] AATA 490 at [48], which held:

    > *Whether all reasonable steps have been taken will be assessed having regard to such matters as the nature of the documents sought in the request, whether documents of that sort are usually filed in a certain category or categories and whether documents of that sort would normally be referred to a certain division, branch or section or to more than one in an agency for action. Steps that are comprehensive and that are directed to locating documents in those places will be relevant.*[4]

5. The following submissions address the process followed by the Court in searching for the documents requested and clearly demonstrate that "*all reasonable steps*" were taken

[1] Paragraph 24A(1)(a) of the FOI Act.
[2] FOI Guidelines [3.89].
[3] FOI Guidelines [3.91].
[4] *Palmer Leisure Coolum Pty Ltd and The Treasury (Freedom of information)* [2022] AATA 2475 at [18].

by the Court to find the documents requested, but the documents could not be found or did not exist.

6. The FOI applicant's internal review request of 3 September 2022, and their original request of 3 August 2022, sought access to the following documents:

> *Under the FOI Act, I request access to:*
> *a) the vacancy notification published in the Public Service Gazette for the National Judicial Registrar vacancy that David Ryan applied for and was selected to fill in the course of a merit based selection process for that National Judicial Registrar role;*
> *b) the record of decision (by a selection panel or otherwise) to select David Ryan to fill the National Judicial Registrar vacancy, which was made in the course a merit based selection process for the National Judicial Registrar role that David Ryan was selected to fill; and*
> *c) the record of the reasons for decision (by a selection panel or otherwise) to select Ryan to fill the National Judicial Registrar vacancy, which was made in the course of a merit based selection process for the National Judicial Registrar role that David Ryan was selected to fill."*

7. The applicant provided very specific parameters for each of the documents requested in their original FOI request dated 3 August 2022, in particular, requesting:

> *For example, consider paragraph (a)…*
> *I am asking for a document that meets all of these criteria:*
> *i) is a vacancy notice published in the Public Service Gazette; and*
> *ii) the notice is for a role that bears the title National Judicial Registrar; and*
> *iii) is a notice for the role (i.e. the National Judicial Registrar) that David Ryan applied to fill; and*
> *iv) is a notice for the National Judicial Registrar vacancy that David Ryan did, in fact, come to fill by virtue of being selected to fill that National Judicial Registrar role following a merit based selection process.*
> *…*
>
> *Now consider paragraph (b)…*
> *I am asking for a document that meets all of these criteria:*
> *i) is a record of decision to select David Ryan for a National Judicial Registrar role; and*
> *ii) is a record of decision made in the course of a merit based selection process for the National Judicial Registrar role that David Ryan did, as a matter of fact, come to fill.*
> *…*
>
> *Now consider paragraph (c)…*
> *I am asking for a document that meets all of these criteria:*
> *i) is a record of reasons for decision to select David Ryan for a National Judicial Registrar vacancy; and*
> *ii) is a record of reasons for decision made in the course of a merit based selection process for the National Judicial Registrar role that David Ryan did, as a matter of fact, come to fill.*

8. The documents sought pursuant to the applicant's requests related to recruitment processes and a restructuring/rebadging of Registrar roles at the Court. Therefore, the existence of any documents within the scope of the applicant's request could have only been created by, or be in the possession of, the Court's People and Culture team.

9. The members of the People and Culture team are generally the only persons with access to employee personnel files (where copies of the recruitment documents would be saved), and are the only persons with access to the Court's recruitment records where those records have not been, or are no longer, available online.

10. The members of the People and Culture team are provided with specific training and guidance by the Court's Office of General Counsel, which is the team that handles all of the Court's FOI requests, on searching for documents pursuant to the FOI Act including what constitutes "*all reasonable steps*". Further, the Court's Office of General Counsel asks each relevant officer who undertakes searches for documents under the FOI Act to complete the search minute template provided in **Attachment 6** under cover of my separate letter, or at the very least to record their searches in a manner that addresses the level of detail in the search minute template.

11. On 8 August 2022, five (5) days after the FOI request was received, a staff member in the Court's Office of General Counsel, referred the FOI request by email to a senior staff member in the Court's People and Culture team. The Court's People and Culture staff are responsible for the Court's recruitment practices and are well-versed in FOI matters having received the specific training and guidance referred to in paragraph [10] above.

12. On 16 August 2022, the senior staff member in the Court's People and Culture team responded to the staff member in the Court's Office of General Counsel advising that they were unable to find any documents within the scope of the applicant's request. The People and Culture senior staff member explained that they had searched the Court's human resources inbox, their own personal staff email, and the Court's Information Management System. These searches took the senior staff member a total of thirty (30) minutes.

13. In the original FOI decision dated 2 September 2022, the decision-maker was satisfied that extensive searches were undertaken to find any documents that fell within the scope of the applicant's request, and that the documents could not be found or do not exist. In particular, the original decision-maker decided:

> *As a result of the searches undertaken, no documents could be found that fell within the scope of your request. I am not aware of any other steps that could reasonably have been taken to identify the documents you have requested.*
>
> *As mentioned above, in your request you outlined, in very particular terms, what you did and did not want to receive by way of documents. It is on this basis (that is, the very narrow terms of your request) that there were no documents found falling within the parameters of your request.*

14. In the internal review decision dated 4 October 2022, the decision-maker was satisfied that extensive searches were undertaken, that no documents within the scope of the applicant's request could be found or exist, and that it was unnecessary for any new searches to be conducted. In particular, the internal review decision-maker decided:

> *Having reviewed the records of searches, and spoken to Court staff involved in those searches, I believe that the searches undertaken were comprehensive and appropriate given the circumstances. These searches also took into account the very narrow and specific parameters of your FOI request. Given the nature of the searches already conducted, I have formed the view that it is unnecessary for any new searches to be conducted.*

15. The Court submits that, despite the applicant's contention that further documents exist within the scope of their request, the Court has taken "*all reasonable steps*" to find documents within the narrow parameters of the applicant's FOI request and that the documents could not be found or do not exist. Specifically, there is no vacancy notification, record of decision, or record of reasons for decision, regarding the "*National Judicial Registrar*" role that the individual the subject of the applicant's FOI request applied for and came to fill.

16. If you have any queries in respect of these submissions, or require any additional information, please do not hesitate to contact the Court.

Yours sincerely

Scott Tredwell
General Counsel